120-97

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1077. (1078 inside)

THE LITTLE ROCK AND FORT SMITH RAILWAY,
PLAINTIFF IN ERROR,

vs.

R. W. WORTHEN, AS COLLECTOR OF PULASKI COUNTY,
ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED OCTOBER 6, 1886.

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INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ	2	1
Caption	3	2
Transcript from Pulaski chancery court	3	2
Complaint	3	2
Exhibit A—Proceedings of Board of Railroad Commissioners	24	10
Submission	26	12
Answer and demurrer	27	12
Order filing return by plaintiff for assessment, and assessment	29	13
Return by plaintiff for assessment	30	13
Assessment by Railroad Commissioners	32	15
Decree	35	16
Allowance of appeal	36	17
Clerk's certificate	36	17
Order advancing cause	37	17
Hearing and submission	37	17
Final decree	37	17
Opinion of the court	38	17
Opinion of Chief Justice Cockrill	53	23
Petition for writ of error	57	25
Bond	59	26
Clerk's certificate	60	26
Citation and proof of service	61	26

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Arkansas, Greeting:

Because in the record and proceedings and also in the rendition of the decree of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Little Rock & Ft. Smith railway and R. W. Worthen, as collector of Pulaski county, *et al.*, wherein was drawn in question the validity of an authority exercised under said State, and which authority so exercised is null and void on the ground of being repugnant to the Constitution of the United States, and the decision of said State court was in favor of the validity of the authority so exercised, all of which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of the said Little Rock & Ft. Smith railway, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of October next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 14 day of April, in the year of our Lord one thousand eight hundred and eighty-six.

[The Seal of the Circuit Court, Arkansas District, U. S. A.]

RALPH L. GOODRICH,
Clerk U. S. Circuit Court, East. Dist. Arks.

2 STATE OF ARKANSAS:

In the Supreme Court.

I, Luke E. Barber, clerk of the supreme court of the State of Arkansas, hereby certify that, in obedience to the mandate of the within writ of error, a duly certified transcript, under the seal of said court, of the record and proceedings in the cause therein stated, with all things concerning the same, except as in the certificate thereof, is hereto attached.

In testimony whereof I hereto set my hand as clerk of said supreme court and affix the seal of said court, at my office, in the city of Little Rock, State of Arkansas, this 10th day of June, A. D. 1886.

[Seal of the Supreme Court of Arkansas.]

L. E. BARBER, *Clerk.*

3 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered that at a term of the supreme court of the State of Arkansas begun and held at the court-house in the city of Little Rock, State aforesaid, on the 23d day, being the fourth Monday, in November, A. D. 1885, were the following proceedings:

On the 27th day of March, A. D. 1886, a day of said term, in the case of Little Rock & Fort Smith Railway, appellant, *vs.* R. W. Worthen, as collector of Pulaski county, & others appellees. Appeal from Pulaski chancery court.

February 5th, 1886, comes said appellant, by attorney, and files transcript of the record of said chancery court in the office of the clerk of the supreme court, which is as follows:

Complaint.

Trans. of Chancery Court.

Pulaski Chancery Court.

LITTLE ROCK & FORT SMITH RAILWAY

vs.

R. W. WORTHEN, as Collector of Pulaski County; A. J. WITT, as Collector of Faulkner County; R. H. Speer, as Collector of Conway County; J. H. Quinn, as Collector of Pope County;
4 W. S. Jett, as Collector of Johnson County; J. T. Tolleson, as Collector of Franklin County; Wm. L. Taylor as Collector of Crawford County; John T. Williams as Collector of Sebastian County.

The plaintiff represents that it is a corporation organized under the laws of Arkansas, in operating a railroad from Little Rock to Fort Smith, in Sebastian county, and the defendants are the sheriffs and *ex-officio* collectors of said counties.

That by the provisions of the act of March 31st, 1883, regulating and providing for the collection of the revenue of this State, the Governor, secretary of state, and the auditor of public accounts are constituted a board of railroad commissioners for this State, and are created a tribunal for assessing certain railroad property situated in the state in the manner provided in said act; and it is made the duty of every person, company, and corporation owning or operating a railroad in this State in the month of March, 1883, and every two years thereafter, to make out and file with the secretary of state a sworn statement or schedule showing the length of the main and all side tracks, switches, and turnouts in each county in which the
5 road may be located and each city or town in each county through which the same may run; also a statement of the value of the improvements, stations, and structures, including the railroad track located on the right of way, which property is denominated "railroad track," and is assessed as real estate; that by the provisions of said act said board is required to meet on the first Monday in April in each year, and authorized and empowered to

assess the property required to be returned to the secretary of state in the manner aforesaid; and after the assessment thereof it is made the duty of the secretary of state to certify to the assessor of each county in which said railroad is located so much of said list as values such railroad track as is located in such county, and in any city or town of such county, and the same is to be assessed and listed as real estate.

It is expressly provided in said act that embankments, tunnels, cuts, ties, trestles, and bridges shall not be included in said schedule or statement as a part of the railroad track or valued, and the power of said board in the matter of such assessment is expressly limited and confined to the property required to be returned in said schedule or statement.

6 Plaintiff represents that its road is located in the counties of Pulaski, Faulkner, Conway, Pope, Johnson, Franklin, Crawford, and Sebastian.

That plaintiff during the month of March, 1885, made out and filed with the secretary of state a sworn statement showing the length of the main and all side tracks, switches, and turnouts in each county, city, and town in which said road is located; also a sworn statement of the value of all improvements, stations, and structures, including the railroad track located on its right of way. Said statement did not include or value embankments, tunnels, cuts, ties, trestles, or bridges.

That said board subsequently met at the time prescribed by law for the purpose of assessing said property, and thereupon illegally and without any authority whatever so to do made and had served upon plaintiff an order requiring it to make and file with the board a statement showing the value of all embankments, tunnels, cuts, ties, trestles, and bridges. A copy of said order is herewith filed, marked "Exhibit A." Whereupon said board proceeded to assess plaintiff's railroad track, and included in said assessment a large amount for the value of embankments, tunnels, cuts, ties, trestles, and bridges. The pretended assessment as made by said board amounted to $— in the aggregate, and was apportioned as

7 follows among the several counties, cities, and towns in which said road is located, viz:

In Pulaski county	$69,260 00
In Faulkner county	76,520 50
In Conway county	86,111 00
In Pope county	107,857 50
In Johnson county	121,531 00
In Franklin county	93,125 50
In Crawford county	69,454 00
In Sebastian county	21,528 00
In the city of Little Rock, in Pulaski county	
In the town of Conway, in Faulkner county	4,140 00
In the town of Plummerville, in Conway county	1,740 00
In the town of Morrillton, in Conway county	3,280 00
In the town of Atkins, in Pope county	3,359 50

In the town of Russellville, in Pope county	4,907 50
In the town of Clarksville, in Johnson county	3,867 50
In the town of Coal Hill, in Johnson county	2,890 00
In the town of Ozark, in Franklin county	3,962 50
In the town of Mulberry, in Franklin county	1,567 50
In the town of Van Buren, in Crawford county	3,070 00
In the city of Fort Smith, in Sebastian county	2,825 00

The valuation of its railroad track as returned by plaintiff amounted in the aggregate to $—, and apportioned among
8 the several counties, cities, and towns aforesaid would be as follows, viz:

In Pulaski county	$36,706 75
In Faulkner county	38,126 65
In Conway county	43,858 60
In Pope county	54,523 30
In Johnson county	61,506 10
In Franklin county	46,073 30
In Crawford county	34,316 95
In Sebastian county	11,281 15

Plaintiff represents that the asssessment of its railroad track was very largely increased by reason of the aforesaid action on the part of said board in including in said assessment embankments, cuts, ties, trestles, and bridges, but plaintiff does not know and cannot ascertain to what extent the assessment is thereby affected, as the same is made *in solido* and is incapable of separation; and it avers that the entire assessment of its railroad track is vitiated and rendered void by the unlawful action of such board.

The plaintiff further avers that the aforesaid act, approved March 31, 1882, and entitled "An act to revise and amend the revenue law of Arkansas," contains and comprises all the laws of this State which are now and have been in force ever since the approval of
9 said act regulating the assessment of taxes on all classes and descriptions of properties throughout this State; that for and during the years 1883 and 1884 all taxes upon the properties of railroads in this State, including the properties of the plaintiff railroad corporation, have been assessed and levied in accordance with the provisions of said act, and in no other way or manner and by no other method; that said act was passed pursuant to the power delegated to the Legislature of said State in and by sec. 5, article 9, of the constitution of said State, which provides as follows, to wit:

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value: Provided, The General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions, and privileges in such manner as may be deemed proper: Provided further, That the following shall be exempt from taxation: Public

property used exclusively for public policy, churches used as such, cemeteries used exclusively as such, school buildings and ap-
10 paratus, libraries and grounds used exclusively for school purposes, and buildings and grounds and materials used exclusively for public charity."

The plaintiff avers that by virtue of said section 5, article 9, of the constitution of this State, supreme and absolute power and authority is delegated to the Legislature to prescribe the way, manner, and mode by which the various descriptions of properties throughout the State and subject to taxation shall be classified and valued, and the taxes thereon shall be assessed, levied, and collected, subject only to the limitations and restrictions contained in said article 9, section 5, and also in section 6 thereof, which provides that "all laws exempting property from taxation other than as prescribed in this constitution shall be void;" that in and by said act of March 31st, 1883, separate and distinct methods are provided, among other things, for ascertaining the value of real estate and personal estate, and also for ascertaining the value of merchandise, of the property of manufacturers, banks, brokers, and stockholders employed in their business respectively, of the property of express and telegraph companies, the tangible and intangible properties of gas, telephone, bridge, street railroad, savings banks, mutual loan building, transportation, construction, and certain other companies or corporations in-
11 corporated under the laws of this State, and also the mode of ascertaining the value of the properties of railroads.

The plaintiff is advised and believes, and therefore avers, that in the language of the Supreme Court of the United States in the case of the Cincinnati, N. O. & T. R. R. Co. *vs.* Commonwealth of Kentucky, the decision in which case was filed in said Court November 16, 1885, and substituting the word "Arkansas" for "Kentucky," "there is nothing in the constitution of Arkansas that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the Legislature
12 has seen fit to impose."

The plaintiff well hoped that the present railroad commissioners would follow, as their predecessors in office had heretofore followed, the requirements and provisions of said act of March 31st, 1883, as it was their sworn duty to do, both as executive officers of the State and also in their character of railroad commissioners, in the mode and manner of listing and valuing the property of the plain-

tiff corporation for the purposes of taxation, but now so it is that, utterly disregarding their official oaths as executive officers of the State, as well as their oaths as railroad commissioners, have not only, without any power or authority, but also in direct violation of the plain and express conditions of said act in that behalf enacted, wilfully and deliberately included in their list and schedule of property of this plaintiff corporation, subject to taxation, the following, to wit: Embankments, cuts, ties, trestles, and bridges, whereas it is expressly provided in the forty-sixth section of said act that "such schedule shall not include nor value embankments, tunnels, cuts, ties, trestles or bridges," and valued the same as subject to taxation,

and this under the pretense that the mode of valuation pre-
13 scribed by said act is contrary to the provisions of said section 6, article 9, of the constitution of this State, and, therefore, utterly null and void, thus wilfully disobeying the laws of the State, which they had sworn fearlessly, impartially, and honestly to execute, and arbitrarily substituting their will for that of the Legislature, and arrogating to themselves judicial as well as legislative powers.

The plaintiff is advised and believes, and therefore avers, that all said acts and doings on the part of said railroad commissioners constitute and are a usurpation of powers in no wise delegated to them, and an encroachment upon the powers in express terms delegated to the judicial and legislative departments of the government of the State; that railroad property in this State can be valued for purposes of taxation, and taxes therein assessed, levied, and collected only by virtue of a statute in that behalf enacted; that, by reason of the aforesaid illegal and despotic acts of said railroad commissioners, the aforesaid pretended valuation and assessment by said commissioners of the "railroad track" of the plaintiff railroad corporation is utterly null and void, as being wholly without warrant of law,

and that the collection of all taxes levied under such illegal
14 and arbitrary valuation and assessment ought in law, equity, and good conscience to be restrained and enjoined; that it is a well-settled maxim of law that every act of the Legislature duly enacted is presumed to be a constitutional enactment until it is otherwise adjudged by the judicial department of the Government, and no such adjudication has been had in regard to the aforesaid act of March 31, 1883, or any of its parts or provisions; that it is wholly immaterial in this case whether the aforesaid provisions of said act which said railroad commissioners not only ignored, but wilfully and deliberately refused to obey, is or is not a constitutional enactment, inasmuch as said commissioners are sworn and in duty bound to execute and not to nullify the aforesaid provisions of said act until the same are declared to be unconstitutional by competent judicial authority; that by reasons of said unlawful and arbitrary acts and doings of said railroad commissioners in connection with the assessment and valuation of the "railroad track" of the plaintiff corporation the taxes levied thereon, and which are now sought to be collected by the collectors of said several counties, have been levied without due process of law and in direct violation of the Four-

15 teenth Amendment to the *to the* Constitution of the United States, which provides that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," inasmuch as it is a direct contradiction in terms and the height of absurdity to maintain that taxes assessed in violation of law are assessed by due process of law.

The plaintiff further avers that while, for the reasons hereinbefore particularly set forth, it is advised that it is wholly immaterial whether the aforesaid provisions of said act of March 31, 1883, are constitutional or not, in order to entitle it to the relief sought, inasmuch as said taxes have not been assessed and levied upon its "railroad track" pursuant to any law of the State, but wholly and solely by the arbitrary will and pleasure of said railroad commissioners and without regard to the rights of the plaintiff, the plaintiff is advised and believes and so avers that the aforesaid provisions of said act which said railroad commissioners wilfully ignored and deliberately violated are in all respects valid and binding enactments; that by the provisions of said sec. 5, art. 9, of the constitution of this State express power is delegated to the Legislature to prescribe the manner and
16 mode by which the value of railroad property shall be ascertained, to wit, "in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State;" that under and by virtue of the power thus expressly conferred upon the Legislature it is their sole duty and province to prescribe the mode of valuing railroad property for the purpose of taxation, and in their discretion to provide whether all the various and divers elements which, when combined, constitute a railroad shall be taken into the account, or whether certain of said elements ought, in equity and justice, to be excluded in estimating the value and earning capacity of such railroads, and that so long as the same method of valuing such railroad tracks is applicable to all railroads within the State, and no discrimination exists in favor of or against any railroad within the State, the provisions in said sec. 5 relating to equality and uniformity are satisfied and complied with; that a railroad track is a peculiar species of property, in which there is no absolute right of ownership, and being, as is declared by the constitution of the State, "a public highway;" that the business of a railroad company being solely that of a common carrier, its value does not by any means depend simply upon the costs of its track, but
17 upon its capacity to make nett earnings over and above the cost of maintenance of way and equipments and the operating expenses thereof; that certain elements which enter into the construction of a railroad, such as embankments, tunnels, cuts, ties, trestles, and bridges, not only increase the original cost of such road, but also, from their very nature, increase the cost of maintaining the track in safe repair, and to that extent diminishes its capacity for making net earnings and the value of its business as a common carrier; that the question, What elements shall be included and what elements excluded in ascertaining the value of a railroad track for the purposes of taxation, is not a judicial question, but one which

is to be determined solely by the Legislature, from time to time, in the exercise of its discretion, and which, when determined, must stand as the law of the State until altered, amended, or repealed; that when the Legislature has prescribed that certain elements shall be excluded in ascertaining the true value of a railroad track, all the officers of the State, judicial as well as executive, are in law bound to treat such expressions of the legislative will, not as an attempt illegally to exempt property from taxation, but simply as a legitimate and lawful exercise of the discretion imposed upon
18 them by the constitution of the State relating to the just and proper method of ascertaining the value of the railroad track of railroad corporations for the purposes of taxation.

If the executive and judicial officers of the State can nullify the exercise of the legislative discretion in this instance, where it has been in express terms imposed by the constitution of the State, they can also nullify the exercise of such legislative discretion in all cases, and the only resource left for the maintenance of constitutional government in this State is by an appeal to the Supreme Court of the United States.

The plaintiff further avers that prior to the passage of the aforesaid act of March 31, 1883, the mode of ascertaining the value of the railroad tracks of railroad corporations was based upon the net receipts of such corporation from its business as a common carrier, as was provided in the act of the year 1879. The plaintiff is advised and believes and avers that if the aforesaid method of ascertaining the value of railroad tracks as is provided for in the aforesaid act of March 31, 1883, shall be held to be unconstitutional, null, and void, then the only mode by which the value of railroad tracks for
19 the purposes of taxation can be ascertained is under the aforesaid act of 1879, for the reason that the mode of valuation provided for in said act of 1883 must, so far as relates to railroad tracks, be taken as a unit, incapable of division and separation, and a mode directly contrary to the one attempted to be provided for by the Legislature cannot be substituted in its place.

The plaintiff further represents that it has paid the taxes assessed and levied upon its rolling-stock and all other property not included in the term "railroad track," and avers that it would willingly pay the taxes upon all its properties denominated in said act of March 31, 1883, as "railroad track" had any lawful valuation and assessment been made thereof, or any lawful levy been made thereon, but no such lawful valuation, assessment, and levy has as yet been made for the reasons hereinbefore set forth.

Plaintiff further avers that it would willingly tender to the several collectors of said several counties the amounts respectively due them from the plaintiff as taxes upon its railroad track for the year 1885, and, upon their refusal to receive the same in full payment of all such taxes as due thereon, bring the same into this honorable
20 court if any means existed by which the plaintiff could ascertain the amounts severally due said several collectors; that under the provisions of sec. 49 of said act it is made the duty of the secretary of state to certify, and the secretary of state has certified, to

the assessor of each county in which the plaintiff's railroad is situated so much of said list and schedule assessed by said railroad commissioners as contains the valuation of so much of said railroad track as is located in such county, and in any city or town of such county, and such assessor is required in each of said counties to list and assess, and the assessors of said several counties have listed and assessed, the same as real estate, and that for the reason that said railroad commissioners have so included and intermingled in their list and schedules so transmitted to the assessors of each said counties certain elements, such as embankments, cuts, ties, trestles, and bridges, which the forty-sixth section of said act expressly provided should not be included, as is hereinbefore averred, it is utterly impossible for the plaintiff to separate the lawful from the unlawful assessments and valuation, and to ascertain the amounts lawfully due the collectors of each said counties. But when the
21 amounts lawfully due said several defendant collectors shall been ascertained the plaintiff offers hereby and herein to pay such amounts to said several defendant collectors within such time as may be prescribed by law.

The plaintiff further avers that the aforesaid several county assessors have delivered to the several county clerks of said counties the list or schedule of assessments so certified as aforesaid by the secretary of state for said several counties, and said several county clerks have *extended* on the tax-books of said several counties against said property so assessed, the State, county, and municipal taxes, as follows, to wit:

State taxes:

For general purposes, — mills.
For school purposes, — mills.
And for — purposes — mills.

For county purposes:

In Pulaski county, 28 mills.
In Faulkner county, 14 mills.
In Conway county, 14 mills.
In Pope county, 14 mills.
In Jackson county, 15½ mills.
In Franklin county, 14 mills.
In Crawford county, 15 mills.
In Sebastian county, 16 mills.

22 For municipal purposes:

In the city of Little Rock, 28½ mills.
In the city of Fort Smith and the towns in said counties, five mills.

The plaintiff avers that the several tax-books for each of said counties have been delivered to the said several respective defend-

ant collectors for each of said counties, who are proceeding to collect the taxes based on the aforesaid illegal and arbitrary assessment on the part of said railroad commissioners, and unless restrained by the order of the court said several collectors will proceed to return the sum to the county clerks of their respective counties as delinquent, and to sell said property for the collection of said taxes and the penalty imposed by law in cases of delinquency; that the plaintiff's right of way and railroad track consists of a strip of land one hundred feet wide, with the road-bed and all improvements, stations, and structures thereon required by law to be assessed, extending throughout its line of railroad from Argenta to Fort Smith, a distance of one hundred and sixty-five miles, and through the counties aforesaid; that the same is indivisable and incapable of separation, each and every part thereof being necessary and essen-
23 tial to the operation of its road, and that from the very nature of things a multiplicity of suits and controversies would necessarily arise should the said several collectors of said several counties sell so much and that part of said line of railroad as is located in each of said several counties in regard to the rights of the several purchasers under said sales, and also in regard to the rights of the plaintiff and of those claiming under the plaintiff as mortgage bondholders or otherwise in and to said railroad track, and the right to operate said railroad notwithstanding said sales.

The premises considered, the plaintiff prays that the defendants be temporarily restrained from returning said railroad track as delinquent, or further proceeding in the collection of said taxes, and upon the final hearing that they may be perpetually restrained and enjoined therefrom, and for such other and further relief as plaintiff may be entitled to under the rules and practice in equity.

J. M. MOORE,
For Plaintiff.

H. Wood, being duly sworn, says he is the agent of the plaintiff and that he believes the facts stated in the above complaint
24 are true.

H. WOOD.

Subscribed and sworn to before me this 29th day of December, 1885.

[L. S.] G. W. SHINN,
Notary Public.

Endorsed: Filed Dec. 29, 1885. J. W. Callaway, clerk, by S. R. Brown, D. C.

EXHIBIT A.

Proceedings of Board of Railroad Commission[ers].

OFFICE OF SECRETARY OF STATE,
LITTLE ROCK, *April 25th*, 1885.

Board of commissioners met pursuant to adjournment.

In conformity with the opinion rendered by the attorney general

the following circular letter was issued by the board to each railroad company operating or being built in this State:

EXECUTIVE OFFICE, LITTLE ROCK, *Ap'l 24th*, 1885.

At a meeting of the board of railroad commissioners for the State of Arkansas, held at the office of the secretary of state on Thursday, April 23d, 1885, it was resolved by said board of railroad commissioners that all the property of railroad companies in this State should be assessed for taxation at its true value as all other property is assessed, without regard to the restrictions and limitations in section 5649 of Mansfield's Digest, which provides "That the schedule of the property of said railroad companies shall not include embankments, tunnel, cuts, ties, trestles, or bridges." The board of commissioners, after full examination and consultation, have determined that such limitations and restrictions are unconstitutional, null, and void, and that they are not bound thereby. The several railroad companies are therefore requested to render full statements of all their property of whatever kind or description and the true value thereof, in accordance with this determination and without regard to the restrictions and limitations aforesaid, on or before the 11th day of May, 1885, at which time a full hearing will be accorded by the board to all who desire to be heard.

SIMON P. HUGHES, *Governor*,
A. W. FILES, *Auditior*,
E. B. MOORE, *Secretary of State*,
Board of Railroad Commissioners for Arkansas.

The board then adjourned to meet again at 2 o'clock p. m., April 27th, 1885.

S. P. HUGHES, *Governor*.
A. W. FILES, *Auditor*.
E. B. MOORE, *S'c'y of State*.

Attest: E. B. MOORE,
Sec'y B'd Railroad Commissioners.

OFFICE OF SECRETARY OF STATE,
LITTLE ROCK, ARKANSAS.

I, E. B. Moore, secretary of state of Arkansas, do hereby certify that the annexed pages contain a true, complete, and full copy of the proceedings had at a meeting of the board of railroad commissioners held April 25th, 1885, as appears by comparing the same with the original roll of said minutes of said board, now on file in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Little Rock, this — day of February, A. D. 1886.

[L. S.] E. B. MOORE,
Secretary of State.

Record, Order, Answer, & Demurrer of De'f't Filed, and Cause Submitted.

LITTLE ROCK AND FORT SMITH RAILWAY
vs.
R. W. WORTHEN, Collector, *et al.*

FRIDAY, *January* 22*d*, 1886.

Come the defendants, by Hon. D. W. Jones, attorney gen-
27 eral, and W. L. Terry, Esq., their solicitors, and file their answer and demurrer to the complaint herein, and after argument of counsel — heard this cause is submitted to the court on the whole case by agreement of counsel.

Answer and Demurrer of Defendants.

Pulaski Chancery Court.

LITTLE ROCK & FORT SMITH RAILWAY, Plaintiff,
vs.
R. W. WORTHEN, as Collector of Pulaski County; A. J. WITT, as Collector of Faulkner County; R. N. Speer, as Collector of Conway County; J. H. Quinn, as Collector of Pope County; W. S. Jett, as Collector of Johnson County; J. T. Tolleson, as Collector of Franklin County; Wm. L. Taylor, as Collector of Crawford County; Jno. T. Williams, as Collector of Sebastian County, Defendants.

The said defendants, for answer to so much and such parts of the said plaintiff's complaint herein as they are advised it is material and necessary for them to answer, admit the corporate existence of the plaintiff, as stated in said complaint, and that all of its said property located on its right of way in said counties was assessed
28 for taxation by the board of railroad commissioners for this State in accordance with the provisions of the act of March 31, 1883, regulating and providing for the collection of the revenues of this State, and that said board, in estimating the value of the "railroad tract" of plaintiff, as defined in said act, disregarded that part of section 46 of said act which attempts to exempt from assessment and taxation embankments, tunnels, cuts, ties, trestles, and bridges of railroad corporations or companies; but they deny that said board, in ascertaining and fixing the valuation of plaintiff's "railroad track" for taxation, ascertained and fixed the value of the embankments, cuts, ties, trestles, and bridges separate and apart from the other property composing such "railroad track," or according to the cost of construction of such embankments, cuts, ties, trestles, and bridges; and they aver the truth to be that said board, in the discharge of its said duty, assessed all of the real property of plaintiff coming within the definition of "railroad track" and including embankments, cuts, ties, trestles, and bridges at its value, and all of the personal or movable property of plaintiff, coming within the definition of "rolling-stock," at its value; that such assessment was not excessive or above the value of such property, and
29 that said board fully and in every particular complied with

its duty under the constitution and laws of this State in making such assessment; and they deny each and every allegation of plaintiff's said complaint to the contrary.

And defendants demur to said complaint, because they say that it does not state facts sufficient to constitute a cause of action.

Wherefore defendants pray that said complaint be dismissed, and for judgment and for costs and other relief.

DAN. W. JONES,
Att'y Gen'l, &
W. L. TERRY,
For Def'ts.

STATE OF ARKANSAS, *County of Pulaski:*

R. W. Worthen, being sworn, says on oath that the statements in the foregoing answer are true to the best of *my* knowledge and belief.

ROB'T W. WORTHEN.

Subscribed and sworn to before me on this Jan'y 22, 1886.
J. W. CALLAWAY, *Clerk,*
By S. R. BROWN, *D. C.*

Endorsed: Filed in open court January 22d, 1886. J. W. Callaway, clerk.

Record Order. Return by Pl'tiff to Board of R. R. Com'rs for Assessment and Assessment by by *Board of Com'rs for Taxes, &c. Filed Tuesday, February 2d,* 1886.

LITTLE ROCK & FOR. SMITH RAILROAD *vs.* R. W. WORTHEN *et al.*

Come the parties by their respective solicitors, and the plaintiff files herein a copy of the return made by the plaintiff to the State board of railroad commissioners of its railroad track for assessment for the year 1885; also a certified copy of the assessment made by said commissioners of said property for said year, and by consent it is agreed that the same shall be made a part of the record and read in evidence at the hearing of said cause.

And it appearing to the court that this order was filed on the 30th day of January, 1886, and by omission of the clerk not entered of record, as should have been done, it is now ordered that the same be entered *nunc pro tunc* as of said 30th day of January, 1886, now for then.

The following two papers are the records referred to in the above

A Copy of the Return Made by the L. R. & Ft. Smith R'y of its Railroad Track to the Board of Railroad Commissioners for Assessment
31 *for the Year* 1885.

L. R. & Ft. Smith R'y Taxes.

Pulaski county—Length, 16.15 miles:		
Main line	$28,262 50	
Sidings	3,312 50	
Buildings	7,000 00	
	38,575 00	@ 28 mills.
Faulkner Co.—Length, 19.92 miles:		
Main line	$34,860 00	
Sidings	1,712 50	
Buildings	2,100 00	
	$38,672 50	@ 14 m.
Conway Co.—Length, 22.14 miles:		
Main line	$38,745 00	
Sidings	2,600 00	
Buildings	2,700 00	
	$44,045 00	@ 14 m.
Pope county:		
Main line	$48,212 50	
Sidings	2,800 00	
Buildings	4,500 00	
	$55,512 50	@ 14 m.
Johnson Co.—Length, 31.44 miles:		
Main line	$55,020 00	
Sidings	3,225 00	
Buildings	3,550 00	
	$61,795 00	@ 15½ mills.
32 Franklin Co.—length, 24.37 miles:		
Main line	$42,647 50	
Sidings	1,275 00	
Buildings	2,900 00	
	$46,822 50	@ 14 m.
Crawford Co.—length, 18.21 miles:		
Main line	$31,867 50	
Sidings	887 50	
Buildings	2,100 00	
	$34,855 00	@ 15 m.

Sebastian Co.—length, 5.22 miles:

Main line	$9,135 00
Sidings	725 00
Buildings	1,750 00
	$11,610 00 @ 16 m.

Endorsed: Filed in open court January 30, 1886. J. W. Cadaway, clerk.

Assessment by Board of Railroad Commissioners.

OFFICE SEC'TY OF STATE,
LITTLE ROCK, *May* 11, 1885.

The Little Rock & Ft. Smith railroad was appraised as follows:

33 Pulaski county:

Length of main line, 16.15 m.	$58,947 50
" " side track, 2.65 m.	3,312 50
Buildings and improvements	7,000 00
Total	$69,260 00

Faulkner county:

Length of main line, 19.92 m.	$72,708 00
" " side track, 1.37 "	1,712 50
Buildings & improvements	2,100 00
Total	$76,520 50

Conway county:

Length of main line, 22.14 m.	$80,811 00
" " side track, 2.08 "	2,600 00
Buildings & improvements	2,700 00
Total	$86,111 00

Pope county:

Length of main line, 27.55 m.	$100,557 50
" " side track, 2.24	2,800 00
Buildings & improvements	4,500 00
Total	$107,857 00

Johnson county:

Length of main line, 31.44 m.	$114,756 00
" " side track, 2.58 "	3,225 00
Buildings & improvements	3,550 00
Total	$121,531 00

34 Franklin county:

Length of main line, 24.37 m.	$88,950 50
" " side track, 1.02 "	1,275 00
Buildings & improvements	2,900 00
Total	$93,125 50

Crawford county:

Length of main line, 18.21 m.	$66,466 50
" " side track, .71 "	887 50
Buildings & improvements	2,100 00
Total	$69,454 00

Sebastian county:

Length of main line, 5.22 m.	$19,053 00
" " side track, .58 "	725 00
Buildings & improvements	1,750 00
Total	$21,528 00

Certificate of Secretary of State.

STATE OF ARKANSAS, *Little Rock, Arkansas:*

I, E. B. Moore, secretary of state of Arkansas, do hereby certify that the annexed pages contain a true, complete, and full copy of the record of the appraised valuation of the Little Rock & Ft. Smith railway tracks and buildings made by the board of railroad commissioners of Arkansas for the year 1884 at a meeting of said board held in Little Rock May 11th to 16th, 1885, as appears by comparing the same with the original records of said appraisments
35 now on file in this office.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Little Rock, this 12th day of January, A. D. eighteen hundred and eighty-six.

[L. S.] E. B. MOORE,
Secretary of State.

Endorsed: Filed in open court January 30, 1886. J. W. Callaway, clerk.

Record, Order, Final Decree, & Appeal by Pl'ff.

LITTLE ROCK & FORT SMITH RAILROAD *vs.* R. W. WORTHEN *et al.*

TUESDAY, *February 2d*, 1886.

Come the parties, the plaintiff by J. M. Moore, its solicitor, and the defendants by the attorney general and W. L. Terry, their solicitors, and thereupon said cause is submitted as on final hearing by consent, on the complaint and answer, the demurrer to the complaint, the exhibit filed with the complaint, and the records filed by counsel

in this cause, and the court, having heard argument of counsel, and being well and sufficiently advised in the premises, is of the opinion that there is no equity in the complaint that the plaintiff is
36 not entitled to the relief prayed; and it is therefore ordered, adjudged, and decreed that the complaint be dismissed, and that plaintiff pay all the costs in this cause expended. And thereupon plaintiff excepted to the ruling and order of the court, and prayed an appeal to the Supreme Court, which is by the court granted.

Certificate to Transcript.

STATE OF ARKANSAS, *County of Pulaski:*

I, J. W. Callaway, clerk of the Pulaski chancery court, do hereby certify that the annexed and foregoing 45 pages contain a complete and true transcript of all the record and proceedings of the Pulaski chancery court made and had in the foregoing-entitled cause as appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Little Rock, Ark's, on this 5th day of February, 1886.

[L. S.] J. W. CALLAWAY, *Clerk*,
By S. R. BROWN, *D. C.*

37 FEBRUARY 6TH, A. D. 1886.

On motion and by consent, this cause is advanced to the present docket, as one involving the public revenues, and set for argument on Wednesday next.

WEDNESDAY, *February* 10, *A. D.* 1886.

Comes the appellant, by Jno. M. Moore, Esq., its solicitor; also come the appellees, by Hon. Dan. W. Jones, attorney general, and W. L. Terry, Esq., and this cause is argued orally and submitted, and by the court taken under advisement.

SATURDAY, *March* 27, *A. D.* 1886.

This cause came on to be heard upon the transcript of the record of the Pulaski chancery court, and was argued by solicitors, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, in all things affirmed, with costs. It is further ordered
38 and decreed that said appellees recover of said appellant all their costs in this court in this cause expended, and have execution thereof.

The court, by Hon. W. W. Smith, judge, delivered the following opinion:

Opinion of Court.

This suit was brought by appellant to enjoin the collection of the taxes for the year 1885 assessed upon its "railroad track" in the

several counties through which said railway runs, upon the alleged ground that the board of railroad commissioners exceeded its powers in requiring the railway company to include in the schedules required to be filed by it a list and valuation of the "embankments, tunnels, cuts, ties, trestles, and bridges," and in considering said "embankments," &c., as elements of value in making the assessment of said "railroad track."

Appellee answered, admitting the assessment of said "railroad track," in accordance with the provisions of the revenue act of March 31, 1883, but denying that said board of railroad commissioners assessed or valued the "embankments, tunnels, cuts, ties, trestles, and bridges" upon appellant's right of way separately and apart from the other real estate constituting said "railroad
39 track," or according to the cost of constructing the same, but alleging that the value of said "embankments," &c., was considered in connection with the other property constituting said "railroad track;" admitted that said board disregarded that part of said revenue act which attempts to exempt from assessment and taxation the "embankments, tunnels, cuts, ties, trestles, and bridges" of appellant as being unconstitutional, and assessed said "railroad track" at its true value, and that such assessment was not excessive.

Appellees also demurred to appellant's complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The cause was heard by the chancellor upon the complaint, answer, and demurrer and exhibits; the relief was denied, the bill dismissed, and the railway appealed.

No question is presented as to the power of the Legislature to provide for the manner of ascertaining the value of this species of property, but it is conceeded that full power is granted by the constitution for the establishment of the board of railroad commissioners, and for the separate classification of railroad property for purposes of taxation. And it was manifestly the intention of the Legislature that this board should have the sole power of
40 assessing all railroad property in this State which is situated on the right of way.

The taxes upon the rolling-stock of the railway company are not in litigation; that was assessed as personal property by the same board of railroad commissioners under secs. 5651 and 5653 of Mansfield's Digest, and the taxes have been paid.

Sec. 5647 provides that "the Governor, secretary of state, and auditor of public accounts shall be, and are hereby, constituted a board of railroad commissioners for this State, and on the first Monday of April in each year shall proceed to ascertain the value of all property, including railroad track, rolling-stock, water and wood stations, passenger and freight depots, offices, furniture, and such other property, real and personal, as is owned by each of the railroads or railways of each company or corporation having existence under the laws of this State, or incorporated in whole or in part therein, and running through or in this State in the manner as hereinafter described."

SEC. 5649. "They," the railroad companies, "shall, in the month of March, in the year 1883, and at the same time every second year thereafter, when required, make out and file with the
41 secretary of state a statement or schedule showing the main and all side tracks, switches, and turnouts in each county in which the railroad may be located, and in each city and town in said county through or into which the road may run; they shall also state the value of all improve[me]nts, stations, and structures, including the railroad track located on the right of way, *but such schedule shall not include nor value embankments, tunnels, cuts, ties, trestles, or bridges.*

SEC. 5650. "Such railroads as described and scheduled in the last preceding section shall be held to be real estate for the purposes of taxation and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof as the railroad track of the — Railroad Company, in the county, city, or town, and such description shall be considered as embracing all the property required to be assessed by section 5649, and when advertized and sold for taxes no other description shall be necessary."

SEC. 5652. "The board of railroad commissioners shall meet on the first Monday in April, in the year eighteen hundred and eighty-three, and at the same time in each year thereafter at the
42 office of the secretary of state for the State of Arkansas, and, after being duly sworn to fearlessly, impartially, and honestly discharge their duties, shall proceed to examine the lists or schedules of the description and value of the railroad track of the railroad companies, filed with the secretary of state, in accordance with the requirements of this act; and if said schedules are made out in accordance with the provisions of this act, and, in the opinion of the board, the valuation of said railroad track is fair and reasonable, said board shall appraise the same, and it shall be the duty of the secretary of state to certify to the assessor of each county in which such railroad is located so much of said list as values such railroad track as is located in such county, and in any city or town of such county, and such assessor shall list and assess the same as real estate by the description, as hereinbefore specified."

These are the principal provisions of the revenue act, so far as they affect this case. The whole controversy has arisen upon the meaning, effect, and constitutionality of the italicised clause of sec. 5649. The railway company made a return of the length of its main line and side track, and of the value thereof, and of the structures on its right of way, not taking into account embankments, tun-
43 nels, cuts, cross-ties, trest-es, or bridges. The board determined that all railroad property in the State should be assessed at its true value like any other property, without any deduction on account of embankments, etc. The several railroad companies were notified and requested to render statements of the true value of their respective lines without regard to the restrictions contained in sec. 5649, and were accorded a full hearing. Acting upon the advice of the attorney general of the State that said clause was unconstitu-

tional, and that they were not bound by it, they proceeded to assess the appellant's railway at a sum nearly double what it had returned.

It is not complained that this valuation was excessive, but the contention is—

First. That the board has no power to construe the constitutionality of any part of the act, but must take it and act under it as it reads, without regard to the question of any part of it being in violation of the constitution.

44 Second. That it is in the power of the Legislature, in providing for the manner of valuing railroad property, to determine what elements shall be taken into consideration as constituting its value, and that it was competent for that body to exclude the "embankments, tunnels, cuts, ties, trestles, and bridges" from the schedules to be filed as not constituting elements of value, and that, therefore, such exclusion in section 5649, *supra*, is constitutional.

Third. That the board of railroad commissioners is created and its powers prescribed and limited by the statute, and that consequently it exceeded its powers in considering the value of "embankments, tunnels, cuts, ties, trestles, and bridges" when valuing the "railroad track" of appellant; that there is no manner provided by law for assessing "embankments, tunnels, cuts, ties, trestles, and bridges," and consequently the same cannot be taxed.

The meaning of the clause in question is not self-evident. If the Legislature intended to enact that the railroad embankments, tunnels, &c., should not be separately assessed, then the board has not attempted to do this, for the pleadings show that the constit-

45 uents of value which enter into railroad property have not been assessed in separate items or parcels, but *in solido*. The whole line considered as a thoroughfare and means of transportation has been valued as a unit. If, on the other hand, the Legislature meant to relieve any portion of the property belonging to railroad corporations from the duty of contributing to the rightful demands of the State in the exercise of its power of taxation they have undertaken to do something which is quite beyond their power.

Now officers of the executive department are not bound to execute a legislative act which, in their judgment, is repugnant to the constitution. Their primary allegiance is due to the constitution, and if there be a conflict between the two the constitution is the higher law, or rather the supposed law is not a law at all, being null and void. They do, indeed, incur peril by deciding for themselves, in advance of the courts, the unconstitutionality of an enactment; but they are also liable to be punished in damages if they carry into effect an act which violates the fundamental law. Rison *vs.* Farr, 24 Ark., 161, affords an illustration.

The constitution of 1864 prescribed the qualification of

46 voters. The Legislature attempted to add to these qualifications by directing that the voter, before depositing his ballot, should make oath that he had not since the 18th of April, 1864, voluntarily borne arms against the United States nor aided the Confederate authorities. Farr possessed the constitutional qualifications, but refused to take this oath. The judges of election would

not allow him to vote, and he recovered a judgment against them, which was affirmed by this court.

Judge Cooley, in his work on Constitutional Limitations, at page 74, says: "Whoever derives power from the Constitution to perform any public function is disloyal to that instrument and grossly derelict in duty if he does that which he is not reasonably satisfied the Constitution permits. Whether the power be legislative, executive, or judicial there is manifest disregard of constitutional and moral obligation by one who, having taken an oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions."

Article XVI of the constitution of 1874 contains the following provisions:

"SEC. 5. All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as
47 the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value.

"SEC. 6. All laws exempting property from taxation, other than is provided in this constitution, shall be void.

"SEC. 7. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State may be a party."

The tunnels, tracks, substructures, superstructures, viaducts, and masonry of a railroad are property—the private property of the stockholders. There must have been an interest in the land to justify the erection or affixing of these structures in the first instance and the exclusive possession and use of them afterwards by the company. They are in fact part and parcel of the railroad. The company controls the improvement, and it is only by lease or other arrangement that the trains of other companies are permitted to run over it. Now, it can make no difference in respect to taxation whether the rails are laid upon the surface of the road or
48 placed on pillars or carried through a covered way or tunnel. Smith *vs.* Mayor, 68 N. Y., 552; People *ex rel. vs.* Commissioners of Taxes, 82 *Id.*, 459; Same *vs.* Same, 3 Eastern Reporter, 569 (N. Y. c't of appeals, Jan'y, 1886).

All railroads are declared by the Constitution (Art. XVII, Sec. 1,) to be public highways, but the public are entitled to use them only upon condition of paying tolls

The theory of our Constitution is that the common burden shall be borne by common contributions. All property is to be taxed according to its value. "All" does not mean all that the Legislature may designate, or all except such as the Legislature may exempt. If this were so the whole burden of taxation might be thrown upon land or upon any one species of property. It means all private property of every possible description, or all property other than that belonging to the State or the General Government. The Legislature cannot discriminate between different classes of property in the imposition of taxes. The only discretion with which it is invested is in the ascer-

tainment of values, so as to make the same equal and uniform throughout the State. People *vs.* McCraery, 34 Cal., 432; Same *vs.* Eddy, 43 *Ib.*, 331; C. & O. R'y Co. *vs.* Miller, 19 W. Va., 49 408; Zanesville *vs.* Richards, 5 Ohio St., 589; Baker *vs.* Cincinnati, 11 *Id.*, 541; Hunsaker *vs.* Wright, 30 Ill., 146; Ellis *vs.* L. & N. R. Co., 8 Jere Baxter, 530; Fletcher *vs.* Oliver, 25 Ark., 289.

But it is further contended that, as the whole authority of the board in the premises is derived from the revenue act, and as the act makes no provision for the assessment of "embankments, tunnels, cuts, ties, trestles, and bridges," therefore the same cannot be taxed. The argument, if limited to the several assessment and taxation of these things is good. But if it is meant that these necessary parts of every railroad are not to be considered in the estimation of the value of the whole line the argument assumes two propositions: First, that the revenue act upon the subject of assessing and taxing railroad corporations must be taken as it was passed by the Legislature, as an entirety, and is either all good or all bad; if all good, then the "embankments," &c., are not subject to taxation, because expressly excluded, and if all bad, then the Legislature has failed to direct the manner in which the value of this species of property shall be ascertained; but in either case the board of 50 railroad commissioners acted *ultra vires;* and, second, that the act merely regulates the assessment of railroad property, and that it is within the power and is the duty of the Legislature to prescribe the manner or mode in which all property shall be assessed for taxation, and that, unless the mode so prescribed is pursued, no valid levy of taxes can be made.

It does not follow that the attempted exemption of certain parts of railroad property avoids the whole revenue act. The exemption being void must be stricken from the act and the act read as if the provision had not been inserted.

People *vs.* McCreery, *supra.*

When a statute is divisible and a portion of it is repugnant to the Constitution so much of the statute is to be upheld as does not conflict with the Constitution and the enactment sustained by rejecting the objectionable part. Watkins, C. J., in Washington *vs.* State, 13 Ark., 757.

Judge Cooley, in his Constitutional Limitations, at page 177 *et seq.*, lays down the rule in such cases to be as follows: "Where a part of a statute is unconstitutional that fact does not authorize the courts to declare the remainder void also, unless all the provisions 51 are connected in subject-matter, depending on each other, operating together for the same purpose or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sec-

tions is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects and is void as to one it may still be in every respect complete and valid as to the other.

This rule was applied by this court in the case of The State
52 *vs.* Marsh, 37 Ark., 356, to a section of the act of 1879, regulating the sale of liquors in this State. This court, through its late learned chief justice, English, declared that it would not undertake to say that the Legislature would have passed the act without the section being just as it was enacted, but that, as passed, the section was in violation of the commerce clause of the Constitution of the United States, and for that reason void; and the section was reformed by the court by striking out the obnoxious words, and as thus reformed it was held to be valid and is now the law of the State.

The clause of sec. 5649 under consideration may be stricken out without detriment to the remainder of the act and the consistency of its parts. It is useless and unnecessary in any view, and construed as providing for an exemption it is ineffectual and mischievous.

Of the proposition that the act is a mere regulation for the assessment of railroad property, it is sufficient to say that this clause, if enforced, would prevent the taxation of such property according to its value. An assessment is a prerequisite to a valid levy of taxes, and the Legislature cannot under the guise of regulating the duties of assessors exempt property from taxation.

People *vs.* Eddy, *supra.*

53 If a law should be passed directing county assessors in assessing farm lands not to include nor value ditches, drains, wells, fences, or other improvements, it would be their duty to go forward and assess the land at its real value.

The decree is affirmed.

Opinion by Hon. S. R. Cockrill, Chief Justice.

Chief Justice Cockrill's separate opinion.

There can be no doubt that under the operation of our constitution the Legislature can, when they see fit, classify railroad property as a separate class for the purposes of taxation. This is sometimes thought necessary from the inherent nature of the property. A former revenue act of this State adopted as a basis suitable for ascertaining a value for taxation the receipts of the railroad from its business. But the act now in force passes the tangible property of railroads into the general mass of taxable property, making the

division of real and personal estate that is made for individuals and subjecting it to its quota fairly due to be levied as a property tax on the common mass. The only difference made between that and other property of the class to which it is assigned by legislative election
54 is the machinery provided for assessment or valuation. One is fixed by the local assessors in the several counties; the other by a State board. The plan, however, provides but one measure of valuation, and that measure, as the constitution provides, is the value—the true value—of the property taxed. When once assigned by the Legislature to the class of property subject to the general property tax there is no escape from its equal share of the common burden to be borne by that class. The constitutional command of equality and uniformity then presses the burden upon the whole mass alike, and prevents the possibility of legislative action oppressing one for the benefit of the rest, or favoring one at the expense of the others. When a general system is provided for taxing a railroad track as real estate it is no more competent for the Legislature to say that it shall be returned for taxation at one-half its real value than to provide for assessing it at double its value, nor after the adoption of such a system would it be competent for the legislative authority to subtract from the mass of real estate any particular part of it, whether it belonged to the agricultural or railroad class,
55 and under the plea of classification exempt it from taxation. Classification may be resorted to for the purpose of separate taxaction, but not for the purpose of permitting an escape from the burden of taxation. Under the sea-ching provisions of our organic law no property can escape taxation, and no subterfuge can be successfully resorted to by the Legislature to effect exemption therefrom.

It is proper to presume that the law-makers who passed the act in question knew the limitation of their power and intended to keep within the bounds pointed out to them by the constitution. If the proviso which excludes from the return for assessment to be made by the companies the value of embankments, tunnels, cuts, &c., was intended as an exemption from taxation of a part of the real estate it would be inoperative, as we have seen. But it does not appear to be necessary so to construe the act, and deference to a co-ordinate department should impel us to put that construction upon it which is consistent with the duty that was incumbent upon them to perform in its passage.

I think the court should regard the proviso merely as a means devised for ascertaining the true value of the road. The cuts, tunnels, trestles, and embankments are all necessary parts of the
56 road, but none of them in itself adds any separate value to it. They merely overcome the inequalities of the soil, and I think it was the intention of the Legislature, in requiring the company to give in for assessment the main and all side tracks, switches, and turnouts, to give them in at their true value as a railroad, without adding to or subtracting from its actual cash or market value as such anything by reason of the accidental fact that it embraced costly cuts or embankments.

The valuation of the "tracks," as defined in the statute, which is inserted in the schedules furnished by the companies, is not conclusive of the value of the road to the commissioners. It is only a means of obtaining information. The duty is devolved upon them of exercising a sound, practical judgment in ascertaining the value of the roads. The eminence of their official position is a guaranty that the duty will be impartially performed. The company does not now complain of the performance of the duty except in this: They appear to have been prevented by the board from deducting from the true value of their road as such the cost or "value," as the statute has it, of their cuts, embankments, trestles, &c.

57 The members of the board would have been derelict in their duty if they had permitted an assessment of the property at less than its real value just as they would have exceeded their authority if they had undertaken to augment the true value of the property as a railroad by reason of the fact that it happened to contain in its make-up, trestles, cuts, and embankments.

As the assessment is regular the decree should be affirmed.

Application for Writ of Error.

To the honorable the judges of the supreme court of Arkansas:

And now comes the Little Rock & Ft. Smith railway, by J. M. Moore, its solicitor, and complains that in the record and proceedings and also in the rendition of a decree in a suit between the Little Rock & Ft. Smith railway, plaintiff, and R. W. Worthen, as collector of Pulaski county; A. J. Witt, as collector of Faulkner county; P. H. Spear, as collector of Conway county; J. W. Quinn, as collector of Pope county; W. S. Jett, as collector of Johnson county; J. Tolleson, as collector of Franklin county; Wm. L. Taylor, as collector of Crawford county, and John F. Williams, as collector of Sebastian county, defendants, in the supreme court of Arkansas, being

58 the highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final decree was rendered against it on the 29th day of March, 1886, in said suit, wherein was drawn in question the validity of an authority exercised under said State and which authority so exercised is null and void on the ground of being repugnant to the Constitution of the United States, and the decision of said State court was in favor of the validity of the authority so exercised, all of which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of the said Little Rock & Ft. Smith railway.

Wherefore it prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

JOHN M. MOORE, *Solicitor.*

Allowed.

S. R. COCKRILL,
Ch. Justice.

59 *Bond on Writ of Error.*

APRIL 14, 1886.

Comes said railroad, by attorney, and presenting to the clerk of this court the writ of error, with a copy thereof, to remove this cause to the Supreme Court of the United State, files the following bond:

KNOW all men by these presents that we, J. M. Moore and Geo. E. Dodge, of Little Rock, are held and firmly bound unto R. W. Worthen, as collector, *et al.*, of Little Rock, in the sum of one thousand dollars, to be paid to the said R. W. Worthen, as collector, *et al.*, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 14th day of April, 1886.

Whereas the above-named Little Rock & Ft. Smith railway hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the supreme court of Arkansas:

Now, therefore, the condition of this obligation is such that if the above-named Little Rock & Ft. Smith railway shall
60 prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

J. M. MOORE, [SEAL.]
GEO. E. DODGE. [SEAL.]

Approved.
STERLING R. COCKRILL,
Chief Justice.

STATE OF ARKANSAS:

In the Supreme Court.

I, Luke E. Barber, clerk of the supreme court of Arkansas, hereby certify that the foregoing 57–8 pages contain a full, true, and complete transcript of the record and proceedings of said supreme court in the case in caption thereof stated, except the briefs of counsel filed.

In testimony whereof I hereto set my hand as clerk and affix the seal of said court at my office, in the city of Little Rock, State of Arkansas, this 10th day of June, A. D. 1886.

[Seal of the Supreme Court of Arkansas.]

L. E. BARBER, *Clerk.*

61 UNITED STATES OF AMERICA, *ss:*

To R. W. Worthen, as collector of Pulaski county; A. J. Witt, as collector of Faulkner county; P. H. Speer, as collector of Conway county; J. W. Quinn, as collector of Pope county; W. S. Jett, as collector of Johnson county; J. Tolleson as collector of Franklin county; Wm. L. Taylor, as collector of Crawford county, and John F. Williams, as collector of Sebastian county, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the first Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Arkansas, wherein The Little Rock & Ft. Smith railway is plaintiff and you are defendants in error, to show cause, if any there be, why the decree in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable S. R. Cockrill, chief justice of the supreme court of Arkansas, this 14th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

S. R. COCKRILL,
Ch. Justice.

I hereby acknowledge due and legal service of this citation upon each of the above-named defendants in error this April 14, 1886.

DAN'L W. JONES,
Att'y Gen'l of Ark's.

Endorsed on cover: No. 1077. Arkansas supreme court. The Little Rock and Fort Smith railway, plaintiff in error, *vs.* R. W. Worthen, as collector of Pulaski county, *et al.* Filed October 6, 1886.